

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE: [REDACTED]
SRC 06 230 51501

Office: TEXAS SERVICE CENTER Date: JUL 27 2007

IN RE: Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Bladnick

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner performs information technology software and systems development services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education necessary for the visa classification requested.

On appeal, counsel asserts that neither he nor the petitioner received the director's notice of intent to deny. Counsel further asserts that the director misread the evaluation of the beneficiary's credentials submitted previously. The petitioner submits a new evaluation of the beneficiary's credentials.

The record is ambiguous as to whether the director properly issued a notice of intent to deny in this matter. As noted by the director, the record contains a returned notice of intent to deny. While the yellow coversheet relates to this matter, the attached notice of intent to deny does not. That said, the regulation at 8 C.F.R. § 103.2(b)(8) provides that if the record contains evidence of ineligibility, the director shall deny the petition. As the director concluded that the evaluation submitted revealed that the beneficiary did not have the required education to be eligible, the director was not required to issue a request for additional evidence or a notice of intent to deny. The petitioner has now been advised of the basis for denial and has attempted to rebut those reasons on appeal. The most efficient means of considering the new evidence is to evaluate that evidence on appeal.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the classification sought. In addition, our authority to reject inconsistent evidence, especially credential evaluations, without objective evidence resolving the inconsistency is firmly established by relevant precedent decisions. Ultimately, the petitioner has not provided objective evidence resolving the inconsistencies in the record regarding the U.S. equivalency of the beneficiary's education. Thus, the petitioner has not established the beneficiary's eligibility for the classification sought.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

The beneficiary possesses a foreign "Diploma" from the Novosibirsky Institute of Engineers awarding the beneficiary the qualification "Engineer - Builder." Thus, the issues are whether that diploma is a foreign degree equivalent to a U.S. baccalaureate degree and, if not, whether it is appropriate to consider the beneficiary's years of experience in addition to that degree. We emphasize that this inquiry is based solely on an interpretation of our own regulations, and not the petitioner's intent in completing the alien employment certification.

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].² Id. at 423. The necessary result of these two grants of authority is that section 212(a)[(5)] determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)]. If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)[(5)] determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United

² As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)[(5)], 8 U.S.C. § 1182(a)[(5)]. The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The Joint Explanatory Statement of the Committee of Conference provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990). In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Thus, in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience.

Initially, the petitioner submitted an evaluation of the beneficiary's credentials completed by Morningside Evaluations and Consulting. The evaluation provides in the heading that the beneficiary's credentials, including his diploma *and* qualifying experience and training, is equivalent to a bachelor of science in engineering and a bachelor of science in computer information systems. The evaluation is divided into three sections: "Academics," "Professional Experience," and "Summary." Under "Academics," the evaluator acknowledged that the beneficiary completed his course of studies at the Novosibirsky Institute and concluded that the beneficiary completed general and concentration specific courses "which *lead to* a baccalaureate degree from the University." (Emphasis added.) At the end of the "Academics" section, the evaluation concludes:

Based upon the courses completed and the number of credit hours earned, it is indicative that [the beneficiary] satisfied requirements substantially similar to those required *toward* the completion of academic studies leading to a Bachelor's Degree from an accredited institution of higher education.

(Emphasis added.) The evaluation then considered the beneficiary's experience and training and concluded:

As described herein, [the beneficiary's] more than ten years of employment reflects experience and training in positions of progressively increasing responsibility and sophistication, illustrated by the application of relevant and specialized skills and training by superiors, together with peers, that represent the equivalent of baccalaureate-level training in Computer Information Systems, and related areas.

Considering the equivalency ratio mandated by the Immigration and Naturalization Service [now CIS] of three years of experience for one year of college training, [the beneficiary's] more than ten years of work experience reflect the time equivalent of not less than three additional years of bachelor's-level academic training in Computer Information Systems.

Finally, the evaluation summarizes the beneficiary's credentials as follows:

On the basis of the credibility of Novosibirsky Institute, the number of years of coursework, the nature of the coursework, the grades earned in the coursework, *and* the hours of academic training in Computer Information systems and related areas, it is the judgment of Morningside Evaluations and Consulting that [the beneficiary] has attained the equivalent of a Bachelor of Science Degree in Engineering and a Bachelor of Science Degree in Computer Information Systems, from an accredited institution of higher education in the United States.

(Emphasis added.)

The director concluded that the evaluation included both the beneficiary's education and experience and did not state that the beneficiary's education alone was equivalent to a U.S. baccalaureate degree.

On appeal, counsel asserts that the director misread the evaluation. According to counsel, the evaluation from Morningside concluded that the beneficiary's education alone is a foreign degree equivalent to a U.S. bachelor of science in engineering degree and that the evaluation only considered the beneficiary's experience in reaching the conclusion that the beneficiary has the equivalent of a U.S. bachelor of science in computer information systems.

The petitioner submits a new evaluation from the Foundation for International Services, Inc. This second evaluation focuses solely on the beneficiary's diploma and concludes that the beneficiary "has the equivalent of a bachelor's and a master's degree in civil engineering from a regionally accredited college or university in the United States." The evaluation indicates that it is based on a UNESCO publication and a P.I.E.R. World Education Series report on the Soviet System of Education. The petitioner did not submit copies of the relevant pages of these publications.

Counsel's assertion that the director misread the initial evaluation is not persuasive. The Morningside evaluation's section on academics alone does not equate the beneficiary's education to any U.S. degree. Rather, the evaluation explicitly states that the coursework is similar to coursework that can "lead to" or is earned "toward" a U.S. degree. Only in the heading and the summary, which includes both education and experience, does the Morningside evaluation conclude that the beneficiary has the equivalency of a U.S. bachelor of science degree in engineering. Notably, the Morningside evaluation does not conclude that the beneficiary has the equivalence of a Master's degree, either based solely on education or when considering education and experience. Thus, the new evaluation submitted on appeal concluding that the beneficiary's degree is equivalent to a Master's degree is inconsistent with the original evaluation.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation *is not in accord with previous equivalencies* or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817

(Comm. 1988). *See also Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Moreover, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Given the inconsistencies in this record of proceeding, the petitioner must do more than simply explain such inconsistencies. Rather, in this matter, the petitioner must provide competent objective evidence pointing to where the truth lies. *Id.* As stated above, the petitioner did not submit copies of the relevant pages of the publications and reports on which the second evaluation relies. Without such evidence, we cannot conclude that the second evaluation is any more credible than the first evaluation, which also claims to have relied on international education reference guides.

The petitioner has not established, through the submission of consistent evidence or objective evidence to overcome the inconsistencies, that the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," and, thus, that he qualifies for preference visa classification under section 203(b)(2) of the Act. For this reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.